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Corrections and Rehabilitation Mule Creek State Prison

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, in her official  
capacity as Secretary of the California  
Department of Corrections and Rehabilitation,

Defendant.

COUNTY OF AMADOR, *a public agency of  
the State of California,*

Plaintiff,

v.

KATHLEEN ALLISON, in her official  
capacity as Secretary of the California  
Department of Corrections and Rehabilitation;  
and PATRICK COVELLO, in his official  
capacity as Warden of California Department  
of Corrections and Rehabilitation Mule Creek  
State Prison,

Defendants.

Case No. 2:20-CV-02482-WBS-AC  
[consolidated with 2:21-CV-00038-WBS-  
AC]

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF CALIFORNIA  
SPORTFISHING PROTECTION  
ALLIANCE'S MOTION FOR  
RECONSIDERATION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: October 31, 2022

Time: 1:30 p.m.

Judge: Hon. William B. Shubb

Ctrm. 5

(Federal Water Pollution Control Act, 33  
U.S.C. §§ 1251 to 1387)

Final Pretrial Conf.: February 13, 2023

Trial Setting Conf.: April 18, 2023

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## I. INTRODUCTION

Defendants KATHLEEN ALLISON, in her official capacity as Secretary of the California Department of Corrections and Rehabilitation, and PATRICK COVELLO, in his official capacity as Warden of California Department of Corrections and Rehabilitation, Mule Creek State Prison (“Defendants”) hereby oppose CALIFORNIA SPORTFISHING PROTECTION ALLIANCE’s (“CSPA”) Motion<sup>1</sup> for Reconsideration of this Court’s August 29, 2022 Order.<sup>2</sup> As set forth herein, CSPA fails to meet the standard for reconsideration as well as the Court’s Local Rule 230(j) because it was Plaintiffs—and not the Court—that committed clear error. Specifically, in claiming that it is “undisputed” that the stormwater discharges at issue actually reached Mule Creek, CSPA shockingly misrepresents both the Court’s Partial MSJ Order and Defendants’ position that was set forth in their Opposition to the Partial MSJ.<sup>3</sup> In fact, the Court clearly ruled that Plaintiffs had *not* proved that the discharges at issue actually reached Mule Creek (and hence, waters of the United States) and Defendants absolutely disputed—and still dispute—whether Plaintiffs established this predicate fact for liability to attach under the Clean Water Act. Moreover, Plaintiffs missed on several opportunities to clearly articulate to the Court its position that Mule Creek’s designation includes the specific recreational use *and* that certain water quality objectives for *E. Coli* allegedly pertain to such beneficial use.<sup>4</sup> Thus, the Court should deny the Motion on these grounds alone.

Alternatively, even if the Court finds that the Partial MSJ Order may be reconsidered, Defendants submit that the Court should again deny summary judgment based on two threshold

---

<sup>1</sup> Plaintiff Amador County did not join CSPA’s Motion for Reconsideration so Defendants refer to CSPA as the moving party here but refer to both plaintiffs with respect to the jointly-filed Motion for Summary Adjudication. The Court’s Order Re: Motion for Partial Summary Judgment (ECF 60, the “Partial MSJ Order”) regarding Plaintiffs’ “Motion for Summary Adjudication” (ECF 45) stated Plaintiffs’ motion should be referred to as a Motion for Partial Summary Judgment. Therefore, Defendants refer to it as such herein (“Partial MSJ”).

<sup>2</sup> August 29, 2022 Order Re: Motion for Partial Summary Judgment (ECF 60, “Partial MSJ Order”) (granting in part and denying in part CSPA and the COUNTY OF AMADOR’s Motion for Partial Summary Judgment).

<sup>3</sup> Defendants’ Opposition to Plaintiffs’ Motion for Summary Adjudication (ECF 48, “Defendants’ Opposition”).

<sup>4</sup> CSPA conflates these two issues to hide that it never explained the latter point to the Court.

1 legal issues and several technical reasons that Plaintiffs’ Partial MSJ did not overcome. First,  
 2 CSPA’s present motion relies exclusively on a data set of *E. Coli* samples that were collected  
 3 *before* CSPA filed its complaint—thus, they do not qualify for any alleged “ongoing” permit  
 4 violations as set forth in the United States Supreme Court’s seminal Clean Water Act<sup>5</sup> decision in  
 5 *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*<sup>6</sup> holding that wholly past discharges  
 6 do not form the basis for citizen suit liability purposes.

7 Second, the applicable legal standard is not (as Plaintiffs erroneously contend) “strict  
 8 compliance” with the Small MS4 Permit (as defined herein) because stormwater discharges are  
 9 governed by the maximum extent practicable (MEP) standard pursuant to Clean Water Act section  
 10 402(p)(3)(B)(iii), meaning that permittees are required to reduce pollutants to the maximum extent  
 11 practicable and implement best management practices (BMPs) rather than adhere to any strict  
 12 numerical discharge standards. The MEP standard is fundamental to evaluating any stormwater  
 13 permit compliance issue—Plaintiffs, however, completely gloss over MEP principles and the  
 14 California Department of Corrections and Rehabilitation’s (“CDCR”) implementation of BMPs in  
 15 claiming permit violations.

16 Finally, numerous technical issues plague Plaintiffs’ claim that Defendants violated the  
 17 Small MS4 Permit, including, but not limited to: (1) the data set consisting entirely of *E. Coli*  
 18 samples do not constitute “waste” as defined in Provision B.1 of the Small MS4 Permit, namely  
 19 waste that is specifically *prohibited* to be discharged pursuant to either of the two plans as set forth  
 20 in Provision B.1 (neither of which “prohibits” the discharge of any waste applicable to Mule  
 21 Creek); (2) Plaintiffs’ expert, Karen Ashby, failed to account for “background” or non-human  
 22 sources of *E. Coli* in erroneously attributing all of the *E. Coli* detections to discharges from  
 23 Defendants’ stormwater system; (3) as the Court noted and found persuasive in the Partial MSJ  
 24 Order, Defendants thoroughly investigated, in conjunction with the Regional Water Board,  
 25 whether there is “commingling” between the facility’s sanitary system and stormwater system and  
 26 determined that no such cross-contamination exists; (4) the Bacteria Provisions in the Water

27 \_\_\_\_\_  
 28 <sup>5</sup> 33 U.S.C. 1330, et seq. (“Clean Water Act”).

<sup>6</sup> 484 U.S. 49 (1987).

1 Quality Control Plan (as defined herein) that Plaintiffs relied upon in the Partial MSJ plainly  
 2 requires that the salinity of the receiving water be determined in order to select the appropriate  
 3 sampling method—which Plaintiffs appear not to have done here; and, (5) toxicity data from Mule  
 4 Creek and the creek’s conspicuous absence from the State of California’s list of “impaired”  
 5 waterbodies demonstrate both that Defendants have not “caused or contributed” to a condition of  
 6 pollution or nuisance. These host of technical deficiencies are fatal to Plaintiffs’ case.

7 Accordingly, CSPA’s motion for reconsideration must be denied as CSPA has not  
 8 demonstrated that the Court committed clear error. Indeed, the Court carefully considered the same  
 9 contentions from Plaintiffs before and soundly rejected them because genuine issues of material  
 10 fact remain that cannot be determined on summary judgment.

## 11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 California Department of Corrections and Rehabilitation (“CDCR”) is the state agency that  
 13 operates Mule Creek State Prison (“MCSP” or “Facility”). The permit relevant to CSPA’s Motion  
 14 for Reconsideration (“MFR”)<sup>7</sup> is the State Water Resource Control Board’s Permit for Waste  
 15 Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer  
 16 Systems (“MS4”), Order 2013-0001-DWQ (the “Small MS4 Permit”).<sup>8</sup>

17 CSPA filed its complaint commencing this action on December 15, 2020, and co-plaintiff  
 18 the County of Amador filed its original action on January 7, 2021. ECF 1, ECF 19. Plaintiffs filed  
 19 their Partial MSJ on June 28, 2022 (ECF 45), seeking summary judgment on each of the following  
 20 issues: (1) whether Mule Creek is a “Water of the United States” within the meaning of the Clean  
 21 Water Act; (2) whether Plaintiffs have Article III standing to bring this action for injunctive relief;  
 22 (3) whether Defendants violated each of four separate provisions of the Small MS4 Permit: (a)  
 23 Provision B.1, (b) Provision B.2, (c) Provision B.3, and (d) Provision D; and (4) whether  
 24

25 <sup>7</sup> Plaintiff California Sportfishing Protection Alliance’s Motion to Reconsider Order RE: Motion  
 26 for Partial Summary Judgment (ECF 67, “MFR”).

27 <sup>8</sup> Defendants’ Request for Judicial Notice in Support of Opposition to Plaintiff California  
 28 Sportfishing Protection Alliance’s Motion for Reconsideration (“RJN”), Exhibit B (“Ex. B”),  
 State Water Resources Control Board Water Quality Order No. 2013-001-DWQ, NPDES  
 General Permit No. CAS000004 (“Small MS4 Permit”).



1 Defendants violated the Industrial General Permit. This Court denied summary judgment as to  
2 issues (3) and (4). ECF 60, 26:8.

3 CSPA's MFR followed, contending that the Court committed clear error in failing to  
4 consider "two material facts" and the implications thereof. MFR, 4:10. Specifically, CSPA  
5 contends reconsideration is necessary because the Court "did not appear to consider" CSPA's  
6 contentions that: (1) Mule Creek has been designated for a recreational (REC-1) beneficial use;  
7 (2) that certain water quality objectives<sup>9</sup> for *E. coli* are based on Mule Creek's recreational (REC-  
8 1) beneficial use designation, and (3) it is "undisputed" that the discharges at issue actually reached  
9 Mule Creek. *See* MFR, 7:5-6, 18-19, 9:8-10. In support of the MFR, CSPA relies exclusively on  
10 certain *E. coli* samples collected from sampling locations MCSP2 and MCSP3 during the period  
11 between April 8, 2019, and May 28, 2020. *See* MFR, 6:7-11. Importantly, CSPA asks the Court to  
12 reconsider the Partial MSJ Order only with respect to alleged violations of Provisions B.1, B.2,  
13 and D. of the MS4 Permit because only the County of Amador is pursuing its claim of violations  
14 of Provision B.3 of the MS4 Permit and the Industrial General Permit. *See* MFR, 5, n.3.

15 The Court ruled on the Partial MSJ on August 29, 2022. The Court found that Plaintiffs  
16 had established standing, but denied them summary judgment as to whether Defendants violated  
17 Provisions B.1, B.2, B.3 and D. of the MS4 Permit. Partial MSJ Order, 26:2-8. In reaching its  
18 decision, the Court specifically ruled that Plaintiffs did *not* establish that the discharges at issue—  
19 including from sampling locations MCSP2 and MCSP3 specifically—actually reached Mule  
20 Creek *and* that Defendants had contested this very issue. Partial MSJ Order, 17:3-10 (emphasis  
21 added). The Court further determined that Plaintiffs had not established that discharges reached  
22 Mule Creek as follows: (1) "here plaintiffs do not appear to have demonstrated that contaminants  
23 at issue here in fact reached or 'accumulated . . . in' Mule Creek;" and (2) "Therefore, because  
24 there appears to be a dispute of material fact as to whether the discharges upon which plaintiffs  
25 rely reached Mule Creek, the court cannot at this time conclude that defendants' discharges entered

26  
27 <sup>9</sup> The Basin Plan refers to "Water Quality Objectives" because it sets forth goals or objectives for  
28 receiving waters to meet. RJN, Ex. D, California Regional Water Quality Control Board, Central  
Valley Region Water Quality Control Plan (Fifth Edition) for the Sacramento River and San  
Joaquin River Basins ("Basin Plan")



1 ‘waters of the U.S.’ or ‘caus[ed] or threaten[ed] to cause a condition of pollution or nuisance’  
 2 therein.” Partial MSJ Order, 21:2-4, 5-10. In making these determinations, the Court specifically  
 3 referred to MCSP2, MCSP3, MCSP5, and MCSP6. Partial MSJ Order, 17:11-14.

### 4 **III. STANDARDS OF REVIEW**

#### 5 **A. MOTION FOR RECONSIDERATION**

6 Motions for reconsideration are an “extraordinary remedy,” and one that should be used  
 7 “sparingly in the interests of finality and the conservation of judicial resources.” *Kona Enters. v.*  
 8 *Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration is appropriate if the district  
 9 court is presented with newly discovered evidence, committed clear error or the initial decision  
 10 was manifestly unjust, or if there is an intervening change in controlling law. *See Shasta Linen*  
 11 *Supply, Inc. v. Applied Underwriters, Inc.*, No. 2:16-158 WBS AC, 2016 WL 6094446, at \*8 (E.D.  
 12 Cal. Oct. 17, 2016).

13 Local Rule 230(j) further provides that a party moving for reconsideration must  
 14 demonstrate the “new or different facts or circumstances . . . claimed to exist which did not exist  
 15 or were not shown upon such prior motion, or what other grounds exist for the motion;” and “why  
 16 the facts or circumstances were not shown at the time of the prior motion.” E.D. Cal. L.R. 230(j)(3),  
 17 (4). This Local Rule derives from the “law of the case” doctrine which provides that the decisions  
 18 on legal issues made in a case “should be followed unless there is substantially different evidence  
 19 . . . new controlling authority, or the prior decision was clearly erroneous and would result in  
 20 injustice.” *See Jackson v. Walker*, No. CIV S-06-2023 WBS GGH P, 2010 WL 1948294, at \*2  
 21 (E.D. Cal. May 11, 2010). As set forth herein, CSPA fails to meet these high standards.

#### 22 **B. MOTION FOR SUMMARY JUDGMENT**

23 Summary judgment is proper only “if the movant shows that there is no genuine dispute as  
 24 to any material fact and the movant is entitled to judgment as a matter of law” with respect to a  
 25 claim or defense. Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial  
 26 burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,  
 27 477 U.S. 317, 322-23 (1986). A non-moving party to a motion for summary judgment “can defeat  
 28 summary judgment by demonstrating the evidence, taken as a whole, could lead a rational trier of

fact to find in its favor.” *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party. *Id.* If direct evidence produced by the moving party conflicts with evidence proffered by the non-moving party, the court must assume the truth of the evidence submitted by the non-moving party. *TW Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630-631 (9th Cir. 1987).

#### IV. LEGAL ARGUMENT

##### A. THE COURT’S DENIAL OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT WAS PROPER AS THE COURT DID NOT COMMIT CLEAR ERROR

###### 1. CSPA Egregiously Misrepresents The Court’s Partial MSJ Order And Defendants’ Position On Whether Plaintiffs Proved In Their Partial MSJ That Stormwater Discharges Actually Reached Mule Creek.

A party moving for reconsideration must demonstrate the “new or different facts or circumstances . . . claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion” and “why the facts or circumstances were not shown at the time of the prior motion.” E.D. Cal. L.R. 230(j)(3), (4). Instead of applying this standard, CSPA misrepresents what this Court previously determined—and Defendants’ position on the issue—with regard to whether Plaintiffs had conclusively established that certain stormwater discharges had reached the waters of the United States, namely Mule Creek, as follows.

First, CSPA erroneously asserts that it is “undisputed” that stormwater discharges from sampling locations MCSP2 and MCSP3 reach Mule Creek. The Court, however, specifically assessed this contention and ruled that Plaintiffs did *not* establish that the discharges at issue—including from sampling locations MCSP2 and MCSP3 specifically—actually reached Mule Creek *and* that Defendants had contested this very issue. The Court unequivocally found:

Further, unlike Provision B.1, which simply prohibits discharges that exceed applicable water quality standards, provision B.2’s plain language indicates that a violation thereof requires that the discharges actually enter a water of the United States. (See Small MS4 Permit § B.2.) *Defendants argue plaintiffs have not proved that the discharges upon which plaintiffs rely actually reached Mule Creek and thus have not proved a violation of provision B.2.* (Opp. at 31.)

Partial MSJ Order, 17:3-10 (emphasis added). The Court further determined that Plaintiffs had not established that discharges reached Mule Creek in ruling:

(1) “[H]ere plaintiffs do not appear to have demonstrated that contaminants at issue here in fact reached or ‘accumulated . . . in’ Mule Creek.” Partial MSJ Order, 21:2-4.

(2) “Therefore, because there appears to be a dispute of material fact as to whether the discharges upon which plaintiffs rely reached Mule Creek, the court cannot at this time conclude that defendants’ discharges entered ‘waters of the U.S.’ or ‘caus[ed] or threaten[ed] to cause a condition of pollution or nuisance’ therein.” Partial MSJ Order, 21:5-10.

There can be no doubt that the Court’s above determinations concern all four sampling locations, and not just MCSP5 and MCSP6 as CSPA claims, as the Court specifically referred to the MCSP2, MCSP3, MCSP5 and MCSP6 sampling locations is making its ruling. Partial MSJ Order, 17:11-14.

Second, CSPA completely misrepresents a portion of the Declaration of Timothy Simpson, Defendants’ retained expert, to further support its contention. MFR, 11:11-14. Mr. Simpson’s Declaration actually states in paragraph 22:

“To properly draw the conclusion that discharges from the Facility are reaching Mule Creek and causing or contributing to receiving water exceedances, monitoring data taken from MCSP2, MCSP3, and MCSP4 must be evaluated concurrently. However, all of the monitoring data that Ms. Ashby relied upon for her assertions that there are “ongoing” violations at the Facility are based on monitoring data collected from MCSP5, MCSP6, and MCSP4.

Declaration of Timothy Simpson in Support of Defendants’ Opposition to Plaintiffs’ Motion of Summary Adjudication (ECF 48), ¶ 22(c)(i). CSPA left out the word “ongoing” from the quote in order to mislead the Court as to its meaning. Mr. Simpson clearly was referring to sampling locations MCSP2 and MCSP3 because those locations pertain to Plaintiffs’ allegations of past violations while MCSP5 and MCSP6 pertain to alleged “ongoing” violations. Declaration of Timothy Simpson in Support of Defendants’ Opposition to Motion for Reconsideration (“Simpson Decl.”), ¶ 11. Thus, the Court was in no way misled by Mr. Simpson’s statement, as CSPA falsely claims here, because it was accurate.

1 Finally, CSPA erroneously claims that there is no dispute that discharges from sampling  
 2 locations MCSP2 and MCSP3 reached Mule Creek simply because they are located “directly  
 3 where” and “near” the creek. MFR, 10:22-24, 11:1-2. Needless to say, CSPA’s proffered  
 4 “evidence” on this issue—statements about the proximity of the sampling locations to Mule Creek  
 5 and a map—fall far short of the evidentiary standard required to grant summary judgment proving  
 6 that the stormwater at issue actually reached Mule Creek. Moreover, the Court previously  
 7 considered these identical arguments in rejecting this slight variation of Plaintiffs’  
 8 “representativeness” argument. Partial MSJ Order, 18:20-20:10.

9 Thus, CSPA fails to meet the standard set forth in Local Rule 230(j). .

10  
 11 2. CSPA, Not The Court, Erred With Regard To Mule Creek’s Beneficial Use  
 Designation And Its Applicability To Water Quality Objectives For *E. Coli*.

12 Motions for reconsideration are denied when the moving party could have, with reasonable  
 13 diligence, presented evidence or arguments to the court for consideration before the court issued  
 14 its ruling but failed to do so. *See Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir.  
 15 2000) (denying motion for reconsideration when plaintiff failed to raise choice-of-law argument  
 16 before court’s ruling, including in prior motion, reply, and during hearing); *Doetsch v. Am.*  
 17 *Household, Inc.*, No. 05CV1072 J (AJB), 2007 WL 2238392, at \*5 (S.D. Cal. Aug. 3, 2007)  
 18 (denying motion for reconsideration when plaintiff failed to cite testimony to the court, finding  
 19 plaintiff cannot use motion for reconsideration to raise evidence for the first time that easily could  
 20 have been raised at summary judgment).

21 CSPA contends that it is entitled to reconsideration because “[t]hrough inadvertence or  
 22 mistake, the Court erred” by not considering Mule Creek’s water contact recreation (“REC-1”)  
 23 designation. MFR, 9:8-20. However, Plaintiffs erred, not the Court, by failing to clearly articulate  
 24 their position regarding which beneficial use designation Ms. Ashby relied on to allege that  
 25 Defendants are in violation of the *E. Coli* water quality objectives. For beneficial use designations,  
 26 the Basin Plan recognizes two different types of water recreation: water contact recreation (“REC-  
 27 1”) and non-contact water recreation (“REC-2”). Plaintiffs’ Motion for Summary Judgment failed  
 28 to appropriately brief the Court on (1) Plaintiffs’ position that one of Mule Creek’s beneficial uses

1 includes REC-1, and (2) how Mule Creek’s beneficial use designation impacts Plaintiffs’ position  
 2 regarding *E. coli* water quality objectives. First, Plaintiffs’ Motion for Summary Judgment failed  
 3 to differentiate between REC-1 and REC-2. Instead, Plaintiffs merely allege generally that Mule  
 4 Creek’s beneficial uses include “recreation.” Partial MSJ, 15:22-24, 27:7-10. In neglecting to  
 5 argue its position that Mule Creek is designated for REC-1 use, Plaintiffs also failed to articulate  
 6 its second position, that *E. Coli* water quality objectives apply to Mule Creek on the basis of Mule  
 7 Creek’s alleged beneficial use designation. Instead, Plaintiffs generally allege that the State Board  
 8 established water quality objectives for certain bodies of water “that have water contact recreation  
 9 beneficial use” without providing any support and the Court has to infer from a Table buried in a  
 10 declaration from its expert to find this contention. Partial MSJ, 16:8-9.

11 In sum, CSPA has not presented any new or different facts, circumstances, or evidence that  
 12 did not exist at the time of its Partial MSJ. With reasonable diligence, CSPA could have presented  
 13 these issues to the Court before a ruling was issued, particularly since Defendants challenged these  
 14 very issues in their Opposition. CSPA had numerous opportunities to do so, including in Plaintiffs’  
 15 memorandum in support of Partial MSJ, in their Reply Brief<sup>10</sup>, during the hearing, and before the  
 16 Court issued its opinion. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571  
 17 F.3d 873, 880 (9th Cir. 2009) (denying motion for reconsideration; “Although the district court  
 18 stated that it did not want to consider the [recently discovered evidence] during the hearing, it did  
 19 not prohibit or even discourage [plaintiff] from submitting the [evidence]...before the court made  
 20 its decision.”). Moreover, CSPA’s MFR again fails to appropriately brief the Court on how or why  
 21 the water contact recreation designation is relevant. CSPA contends, without providing any  
 22 support, that the *E. coli* standards are based on REC-1 designation, which “indisputably” applies  
 23 to Mule Creek. MFR, 9:2-10. CSPA should be foreclosed from relying on a purportedly undisputed  
 24 fact that Defendants were never provided an opportunity the refute. Instead, CSPA argues that the  
 25 Court committed clear error in its evaluation, attempting to use reconsideration as a vehicle to  
 26 address issues it failed to address, and placing blame on the Court for its own neglect.

27  
 28 <sup>10</sup> Plaintiffs’ Reply Brief in Support of Motion for Summary Adjudication (ECF 55).

**B. THE COURT’S DENIAL OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT WAS PROPER BECAUSE PLAINTIFFS FAILED TO DEMONSTRATE WITH UNDISPUTED EVIDENCE THAT THERE ARE ANY ONGOING *E. COLI* EXCEEDANCES AS A MATTER OF LAW**

As with other jurisdictional matters, a plaintiff's burden to establish an ongoing violation evolves over the course of the litigation. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003). A party seeking summary judgment in the traditional context "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted).

The exact nature of this responsibility varies depending on whether the issue on which summary judgment is sought is one in which the movant or the nonmoving party carries the ultimate burden of proof. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of proof at trial, it must demonstrate, with affirmative evidence, that "no reasonable trier of fact could find other than for the moving party." *Id.* As the moving party here, CSPA failed to satisfy its burden necessary to prevail on its motion for summary judgment. For the reasons discussed herein, this Court found a material factual dispute as to whether there are any ongoing violations of Provisions B.1, B.2, and D. of the Small MS4 Permit, and correctly denied summary judgment accordingly. *See St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*, No. 3:07-cv-739-J-34TEM, 2010 U.S. Dist. LEXIS 17881, at \*44-46 (M.D. Fla. Mar. 1, 2010) (court found plaintiff's evidence sufficient to survive defendants' motion for summary judgment, but failed to satisfy the burden necessary to prevail on cross motion for summary judgment against defendant).

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, the Supreme Court found the use of the present tense in section 505(a) of the Clean Water Act to be indicative of Congress's intent to provide a "primarily forward-looking" remedy, and held that the citizen suit authority was limited to situations where the defendant was engaged in continuous or intermittent violations at the time the citizen suit action was filed. 484 U.S. 49, 59 (1987). The Ninth Circuit has found that

1 a plaintiff may prove ongoing violations “either (1) by proving violations that continue on or after  
 2 the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact  
 3 could find a continuing likelihood of a recurrence in intermittent or sporadic violations.” *Sierra*  
 4 *Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988) (citing *Chesapeake Bay Foundation v.*  
 5 *Gwaltney*, 844 F.2d 170, 171-72 (4th Cir. 1988)). Interpreting *Gwaltney*, the Ninth Circuit stated  
 6 that until a district court makes “factual findings” on the issue of ongoing violations, or the  
 7 reasonable likelihood of continuing future violations, penalties for past permit violations may not  
 8 be assessed. *Id.* at 669-671.

9 CSPA now asserts that a certain set of analytical data, all collected before the filing of its  
 10 complaint, provides evidence of alleged “exceedances” that constitute alleged violations of various  
 11 provisions of the Small MS4 Permit. CSPA describes the monitoring data as alleged “past  
 12 violations” that pre-date the filing of its complaint, and asks the Court to reconsider its ruling on  
 13 summary judgment on this basis. However, CSPA’s requested relief seeks to impose liability  
 14 against Defendants for wholly past violations, in opposite to *Gwaltney*. As CSPA only alleges  
 15 wholly past violations in its MFR, therefore, Court should not use these past violations as the basis  
 16 for summary judgment.

17 **C. PLAINTIFFS CANNOT ESTABLISH VIOLATIONS OF THE SMALL MS4**  
 18 **PERMIT AS A MATTER OF LAW BECAUSE THE MAXIMUM EXTENT**  
 19 **PRACTICABLE STANDARD APPLIES TO THE STORMWATER DISCHARGES**  
 20 **AT ISSUE**

21 As set forth in Defendants’ Opposition, under the Clean Water Act’s “Stormwater  
 22 Amendments” in section 402(p)(3)(B)(iii), municipal permits “shall require controls to reduce the  
 23 discharge of pollutants to the *maximum extent practicable*, including management practices,  
 24 control techniques and system, design and engineering methods, and such other provisions as the  
 25 Administrator or the State determines appropriate for the control of such pollutants.” 33 U.S.C. §  
 26 1342(p)(3)(B)(iii) (emphasis added). The Ninth Circuit has held that the Clean Water Act  
 27 “unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to  
 28 comply strictly” with more stringent requirements applicable to industrial dischargers. *See,*  
*Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-1166 (9th Cir. 1999). Consistent with this



1 authority, the Water Board has determined that it is appropriate to (1) require implementation of  
 2 best management practices (“BMPs”) in lieu of numeric water quality-based effluent limitations;  
 3 and (2) prescribe an iterative process with permittees for BMP improvement to achieve water  
 4 quality standards. RJN, Ex. C, State Water Resources Control Board Fact Sheet for NPDES  
 5 General Permit and Waste Discharge Requirements for Storm Water Discharges from Small  
 6 Municipal Separate Storm Sewer Systems, Order No. 2013-0001-DWQ, as Amended by Order  
 7 2017-XXXX-DWQ (“MS4 Fact Sheet”)

8 Plaintiffs, however, apply a “strict compliance” standard to the Small MS4 Permit in  
 9 contending that CDCR violated its provisions. Such attempt, however, misconstrues the plain  
 10 language of the Small MS4 Permit and writes the MEP standard out of the permit. In issuing the  
 11 Small MS4 Permit as a regulatory order<sup>11</sup>, the State Water Resources Control Board (“State  
 12 Board”) made several regulatory “Findings” relevant to the interpretation of its provisions as  
 13 follows:

- 14 - In Finding No. 27, the State Board determined that Small MS4s “face highly  
 15 variable conditions both in terms of threats to water quality from their storm water  
 16 discharges and resources available to manage those discharges. Therefore, *one set  
 of prescriptive requirements is not an appropriate regulatory approach for all  
 Regulated Small MS4s.*”
- 17 - In Finding No. 36, the State Board determined that “Consistent with Clean Water  
 18 Act section 402(p)(3)(B)(iii), this Order requires controls to reduce pollutants from  
 19 the MS4 to the maximum extent practicable (MEP). The MEP standard requires  
 20 Permittees to apply Best Management Practices (BMPs) that are effective in  
 21 reducing or eliminating the discharge of pollutants to the waters of the U.S. MEP  
 22 emphasizes pollutant reduction and source control BMPs to prevent pollutants from  
 23 entering storm water runoff. MEP may require treatment of the storm water runoff  
 24 if it contains pollutants. The MEP standard is an ever-evolving, flexible, and  
 25 advancing concept, which considers technical and economic feasibility. BMP  
 26 development is a dynamic process and may require changes over time as the  
 27 Permittees gain experience and/or the state of the science and art progresses. To do  
 this, the Permittees must conduct and document evaluation and assessment of each  
 relevant element of its program, and their program as a whole, and revise activities,  
 control measures/BMPs, and measurable goals, as necessary to meet MEP. MEP is  
 the cumulative result of implementing, evaluating, and creating corresponding  
 changes to a variety of technically appropriate and economically feasible BMPs,  
 ensuring that the most appropriate BMPs are implemented in the most effective  
 manner.

28 <sup>11</sup> Order No. 2013-0001-DWQ, superseding Order No. 2003-0005-DWQ.  
 00055671.3}}

- 1 - In Finding No. 45, the State Board determined that in filing a Notice of Intent (to  
2 come under coverage of the permit), the Notice of Intent represents the Permittee's  
3 commitment to comply with the BMPs specified in this Order to *achieve*  
4 *compliance* with the minimum control measures specified at 40 Code of Federal  
5 Regulations sections 122.34 (b)(1) through (b)(6).

6 RJN, Ex. B, Small MS4 Permit; Simpson Decl., ¶ 17. Thus, consistent with Clean Water Act  
7 section 402, the State Water Quality Control Board was clear in its Order implementing the Small  
8 MS4 Permit and in the MS4 Fact Sheet that stormwater permittees are governed by the flexible  
9 MEP standard rather than "strict compliance" as Plaintiffs claim. As such, CDCR's considerable  
10 efforts at reducing the discharge of pollutants consistent with the MEP standard by implementing  
11 BMPs must be taken into account and negates a finding of any permit violations.

12 **D. PLAINTIFFS CANNOT ESTABLISH THAT DEFENDANTS VIOLATED THE  
13 SMALL MS4 PERMIT AS A MATTER OF LAW**

14 As set forth above, CSPA is asking the Court to re-visit its Partial MSJ Order based on  
15 distorting the record on whether certain discharges actually reached Mule Creek and casting the  
16 same *E. Coli* evidence in a new light. The Court, of course, will consider Defendants' Opposition  
17 to the Partial MSJ and they incorporate that brief by reference herein. For the Court's convenience,  
18 however, Defendants also summarizes the following salient points from Defendants' Opposition  
19 and adds new perspectives as follows.

- 20 1. Stormwater Containing *E. Coli* Does Not *Per Se* Constitute "Waste" That Is Prohibited  
21 From Being Discharged Pursuant To Provisions B.1 And B.2 Of The Small MS4  
22 Permit.

23 Plaintiffs made two fatal mistakes in their Partial MSJ in claiming violations of Provisions  
24 B.1 and B.2. First, they claim that CDCR had "past violations" related to stormwater discharges  
25 that contained *E. coli* into waters of the United States in violation of the Small MS4 Permit  
26 provisions B.1 and B.2 and that such discharges constitute waste *per se*. Provision B.1 of the  
27 Small MS4 Permit, however, prohibits the discharge of "waste" from the MS4 that is specifically  
28 prohibited from being discharged by the applicable Statewide Water Quality Control Plan or the  
Basin Plan. Thus, Plaintiffs short-circuited the analysis by not providing the Court with its view

1 of which plan *prohibits* the discharge of *E. Coli*. In fact, neither prohibit the discharge of  
 2 stormwater containing *E. Coli per se*, they instead set forth objectives for receiving waters to meet.  
 3 Moreover, to the extent that Plaintiffs are equating “waste” with the presence of sewage, the low  
 4 levels of ammonia in the discharges at issue belie such claim. Simpson Decl, ¶ 21.

5 Second, Provision B.2 provides that “[d]ischarges of storm water from the MS4 to waters  
 6 of the U.S. in a manner causing or threatening to cause a condition of pollution or nuisance as  
 7 defined in Water Code § 13050 are prohibited.” Plaintiffs again short-circuited the analysis by not  
 8 evaluating the full definitions of “pollution” and “nuisance” as specifically set forth in the Water  
 9 Code. Water Code section 13050 defines “pollution as an alteration of the quality of water by  
 10 waste to a degree which *unreasonably* affects” its beneficial uses. Cal. Water Code § 13050 (l)(1).  
 11 Thus, for both permit provisions the contaminant at issue must constitute “waste,” with Provision  
 12 B.2 additionally requiring an unreasonable effect on the water’s beneficial use to constitute  
 13 “pollution” and, therefore, a permit violation. Thus, the *reasonableness* of the alleged impacts is  
 14 an essential element of the analysis—and one completely ignored by Plaintiffs—that is inherently  
 15 a triable issue that must considered by a trier of fact. Therefore, the Court’s denial of summary  
 16 judgment was proper.

17 2. Plaintiff’s Expert Failed To Account For Background And Non-Human Sources Of *E.*  
 18 *Coli*, Erroneously Attributing All *E. Coli* Detections To Discharges From The Facility.

19 Defendants’ Opposition raised numerous fatal flaws in Ms. Ashby’s methodologies,  
 20 rendering her expert opinions unreliable. Relevant to Plaintiff’s MFR is Ms. Ashby’s failure to  
 21 account for readily-apparent “background” and non-human sources of *E. Coli* in her assessment.  
 22 Simpson Decl, ¶¶ 18, 19, 22, 23. With respect to this required element of causation, Ms. Ashby  
 23 failed to account for: (1) the substantial background and upstream contributors of contaminants  
 24 detected in Mule Creek, including evidence of major contributions of upstream sources of *E. coli*  
 25 from upstream cattle ; (2) the dominant impacts of bird and deer contributions (i.e., background)  
 26 to contaminants detected at the Facility itself as demonstrated by DNA testing and the 2021  
 27 Sources of Fecal Pollution Report; and, (3) stormwater toxicity data showing that discharged  
 28 effluent is not toxic and poses no real threat to aquatic life. *See also*, Simpson Decl., ¶¶ 16, 22, 23.

1 The Water Board and CDCR worked closely with an independent public research and  
 2 development agency known as the Southern California Coastal Water Research Project  
 3 (“SCCWRP”), established in 1969 to improve the management of aquatic ecosystems, to further  
 4 investigate the sources and scope of fecal matter in Mule Creek. Defendants’ Separate Statement  
 5 of Disputed Facts in Support of Opposition to Plaintiffs’ Motion for Summary Adjudication  
 6 (“Defs’ SS”) [ECF 50], ¶ 34; Simpson Decl., ¶ 20. SCCWRP conducted an extensive investigation  
 7 consisting of twenty-two (22) days of sampling, 14 of which were during or promptly after rain  
 8 events, and collected numerous samples from Mule Creek both upstream and downstream of  
 9 MCSP. Defs’ SS, ¶ 35. SCCWRP’s January 2021 report entitled, “Quantification of Sources of  
 10 Fecal Pollution at Mule Creek,” (the “2021 Sources of Fecal Pollution Report”) demonstrates that  
 11 fecal bacteria detected in stormwater at MCSP is almost entirely from animal sources (bird and  
 12 deer) and not from any appreciable human sources. Defs SS, ¶ 36; Simpson Decl., ¶ 20. It further  
 13 concluded that fecal bacteria levels in Mule Creek were often higher upstream of MCSP and that  
 14 human fecal matter in stormwater was at negligible levels. Defs’ SS, ¶ 37. Finally, the 2021  
 15 Sources of Fecal Pollution Report demonstrated that the overall water quality conditions of Mule  
 16 Creek were heavily impacted by cows (i.e., cattle ranches) upstream of MCSP and background  
 17 sources (birds and deer), rather than human fecal contributions. Simpson Decl., ¶ 20.

18 Accordingly, Defendants’ Opposition presented evidence that Plaintiffs’ expert’s opinions  
 19 are unreliable. Defendants’ investigations directly refute Plaintiff’s claim that exceedances in *E.*  
 20 *coli* are attributable to MCSP. Accordingly, a reasonable trier of fact could find that Defendants  
 21 did not violate Provisions B.1, B.2, and D. for *E. Coli* discharges. Accordingly, denial of summary  
 22 judgment was proper.

23 3. CSPA Failed to Determine The Salinity of Mule Creek—As Required By The Bacteria  
 24 Provisions That It Relies Upon.

25 Plaintiffs asserted in the Partial MSJ that the stormwater discharges now at issue exceeded  
 26 the Water Quality Objectives for *E. Coli* set forth in the February 4, 2019, Part 3 of the Water  
 27 Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California,  
 28

Bacteria Provisions and a Water Quality Standards Variance Policy (the “Bacteria Provisions”).<sup>12</sup> Plaintiffs County of Amador’s and California Sportfishing Protection Alliance’s Appendix of Exhibits in Support of Motion for Summary Adjudication (“Pls’ Appx.”) [ECF 45-10], Exh. 10. Specifically, Plaintiffs’ expert compared the monitoring data from certain stormwater monitoring locations with the *E. Coli* Water Quality Objectives in Table 1. Crucially, however, section III. E. 2 (Bacteria Water Quality Objectives) provides that there are two distinct objectives for bacteria, “depending on the salinity level” as set forth in that Table 1 (for *E. Coli* and *Enterococci*). (Pls’ Appx., Exh. 10, p. 2). The next section of the Bacteria Provisions on page 3 further specifies that the *E. Coli* objective applies to waters where the salinity levels is less than a certain level “95 percent of the time during the CALENDAR YEAR” while the *Enterococci* objective applies to waters where the salinity is greater than a certain salinity level “more than 5 percent of the time during the CALENDAR YEAR.” Table 1 repeats this same sampling requirement of the water’s salinity. As set forth by Defendants’ counsel during the August 22, 2022 hearing on the Partial MSJ, establishing the salinity level of Mule Creek is crucial to determining which Water Quality Objective applies. However, nowhere in Plaintiffs’ moving papers or Ms. Ashby’s supporting declaration is this determination made. Thus, Defendants submit that it would be inappropriate for the Court to determine as a matter of law which objective applies here without such salinity sampling being conducted.

4. Defendants Dispute Whether Their Stormwater Discharges Have “Caused Or Contributed” To An Impairment Of Mule Creek And Plaintiffs Did Not Prove This With Uncontroverted Evidence.

Under the Clean Water Act section 303(d), states are required to identify waterbodies that do not meet, or are not expected to meet, WQOs (known as “impaired waterbodies”). 33 U.S.C. § 1313(d). Thus, waterbodies in California that exceed protective WQS are placed on the state’s 303(d) List. Defs’ SS, ¶ 42. Based on California’s Listing Policy in developing the 303(d) list, the Water Board evaluates water quality-related data and information. *Id.*

<sup>12</sup> RJN, Ex. E, State Water Resources Control Board – Part 3 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California, Bacteria Provisions and a Water Quality Standards Variance Policy (“Bacteria Provisions”).

1 Thus, in order to prevail on this claim, Plaintiff must prove that the receiving water, Mule  
2 Creek, has exceeded an applicable water quality standard (known as an “impairment”) set forth in  
3 the California Toxics Rule (“CTR”), the Water Control Plan, or the Basin Plan. However, neither  
4 the direct receiving water (Mule Creek) nor the two waterbodies downstream of Mule Creek (Dry  
5 Creek and the Mokelumne River) are “listed” by the State of California as impaired waterbodies  
6 pursuant to 303(d) of the Clean Water Act. There is no assessment data for Mule Creek on the  
7 Water Board’s 303(d) List for 2020-2022, the current watershed impairment list for the area, but  
8 there is assessment data for Dry Creek, which is the next waterbody receiving flows from Mule  
9 Creek. *Id.* The Water Board did not designate Dry Creek as impaired. Simpson Decl., ¶ 15 (also  
10 opining that toxicity data from Mule Creek demonstrates that it was not been impaired.

11 Plaintiff did not met its burden of establishing that discharges from MCSP are violating  
12 discharge prohibitions or receiving water limitations because it has not presented uncontroverted  
13 evidence that Mule Creek is actually impaired. Mule Creek’s conspicuous absence from the State  
14 of California’s list of impaired waterbodies, in conjunction with water quality data collected from  
15 Mule Creek, demonstrate that Mule Creek has not been, and is not currently, impaired. Therefore,  
16 a reasonable trier of fact could find that Defendants have not caused or contributed to a condition  
17 of pollution or nuisance. Accordingly, the Court’s denial of summary judgment was proper.

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**V. CONCLUSION**

At this stage, there can be no summary adjudication of Plaintiffs' claims, as there are numerous material facts in genuine dispute. Based on the foregoing, Defendants respectfully request the Court to deny the Motion for Reconsideration and allow them the opportunity to present their defense of these meritless claims at trial.

Dated: September 29, 2022

Respectfully submitted,

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